IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

TUESDAY, THE 27TH MARCH 2007 / 6TH CHAITHRA 1929

SA.No. 480 of 1993()

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AS.41/1989 of ADDL. DISTRICT COURT, THALASSERY
OS.197/1987 of .M.C.,KANNUR

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APPELLANT: DEFENDANT/DEFENDANT

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THE CANNANORE MUNCIPAL COUNCIL
REPRESENTED BY THE COMMISSIONER,
CANNANORE MUNCIPALITY, CANNANORE.

BY ADV. SRI.ISAAC M.PERUMPILLIL
SRI.R.ANILKUMAR

RESPONDENT:APPELLANT/PLAINTIFF

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P.JOHN MATHEW, S/O.DR.P.A.MATHEW
PAYYAMBALAM, CANNANORE.

BY ADV. SRI.M.K.SUMOD
SRI.KAUSER EDAPPAGATH
SMT.A.LOWSY

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 27/ 3 /2007 THE COURT ON 27/03/2007 DELIVERED THE FOLLOWING:

**M.SASIDHARAN NAMBIAR,J.**

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S.A. NO.480 OF 1993

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Dated this the 27th day of March 2007

JUDGMENT

Defendant Municipality in O.S.No.197/87 on the file of Munsiff Court, Kannur is the appellant. Respondent filed the suit seeking a decree for permanent prohibitory injunction restraining appellant from taking steps to demolish any portion of the compound wall constructed by respondent in the plaint schedule property. On 20.4.1987, appellant issued Ext.A1 provisional order along with A2 notice calling upon respondent to show cause why within three days of receipt of the notice Ext.A1 provisional order shall not be made absolute. Under Ext.A1 provisional order, respondent was to demolish the compound wall constructed without obtaining necessary permission or licence from the Municipality. Ext.A1 provisional order was passed as provided under sub section (1) of Section 247 of Kerala

Municipalities Act,1960(Act 14 of 1961). Ext.A2 notice was issued as provided under sub section (2) of Section 247. Case of respondent was that under sub section (2) of Section 247, Commissioner shall provide a reasonable time to respondent to show cause and under Ext.A2 only three days period was granted and so it is against natural justice and therefore appellant is not entitled to take action pursuant to Exts.A1 and A2 and a decree is to be granted.

2. Appellant filed a written statement contending that the suit is not maintainable as respondent has got equal and efficacious remedy under the Municipalities Act. It was contended that respondent constructed the compound wall abutting the public road to a length of 19 meters without obtaining permission or licence as contemplated under the Municipalities Act and the Rules and therefore action has been taken as provided under section 247 of the Municipalities Act and respondent is not entitled to the decree sought for.

3. Learned Munsiff on the evidence of

respondent as PW1 and Exts.A1 and A2, dismissed the suit holding that respondent has other efficacious remedy available and therefore the suit is not maintainable. The learned Munsiff also found that respondent having showed cause to Ext.A2 notice is not entitled to get a decree on the ground that reasonable time was not granted as provided under the Act. Respondent challenged the decree and judgment before District Court, Thalassery in A.S.41/1989. Learned District Judge did not consider the question of bar of the suit because of the availability of other efficacious remedy under the Act. On the other hand, relying on the decision of a learned single Judge of this Court in **Kuriyakose v. Municipal Council, Shertallai (1981 K.L.T. 122),**it was held that reasonable time as provided under section 247(2) was not granted under Ext.A2. Learned District Judge also held that under section 247A(1)of the Municipalities Act Government is competent to accept a sum of money as fixed from the person who has unlawfully constructed a building or wall without obtaining permission of the competent authority and compound

the matter and therefore granted a decree in favour of the respondent. The appeal was allowed.

4.The Second Appeal was filed challenging the decree and judgment of the learned Additional District Judge.

5. The appeal was admitted after formulating the following substantial questions of law.

1) Whether first Appellate Court was correct in granting a decree in favour of respondent when equal and efficacious remedy of appeal is available to the respondent under the Municipalities Act?

2) Whether first Appellate Court was correct in interfering with the decree granted by the learned Munsiff and if so, whether it is sustainable?

6. Learned counsel appearing for the appellant and respondent were heard.

7. The argument of learned counsel appearing for appellant was that as rightly found by the learned Munsiff respondent has a remedy of appeal against an order passed by the Commissioner under section 247 before the Council as provided under section 364 and without exhausting the remedy,

respondent is not entitled to file the suit and learned Additional District Judge did not consider this question at all and therefore the decree granted is unsustainable. It was also argued that sub section (2) of Section 247 only mandates that reasonable time is to be granted to show cause and when respondent submitted an objection showing the cause,Ext.A2 notice is not bad and respondent is not entitled to contend that he did not get reasonable time and therefore the finding of learned Additional District Judge relying on the decision in **Kuriyakose case (supra)**is not correct. Learned counsel appearing for respondent argued that respondent has no right of appeal against Ext.A1 provisional order or Ext.A2 notice and in view of the threat of taking action under Ext.A1 order, respondent has no other alternative or efficacious remedy than approaching the civil court and therefore the suit is maintainable. It was also argued that as found by learned Additional District Judge, failure to take licence in constructing the compound wall could be compounded as provided under section 247A(1) and therefore

first Appellate Court rightly granted the decree and there is no reason to interfere with that decree.

8. The contention of the appellant was that the compound wall abutting the public road, to a length of 19 meters, was constructed without taking any licence or permission. Respondent has no case that any such licence or permission was obtained before constructing the compound wall, against which action was proposed to be taken under Exts.A1 and A2. Ext.A1 provisional order was passed under sub section (1) and Ext.A2 notice was issued under sub section (2) of Section 247. Learned Additional District Judge relying on the decision of a learned single Judge (as his Lordship then was) in **Kuriakose case** held that under Ext.A2 only three days time was granted and reasonable time shall not be less than 14 days as held by this Court and therefore Ext.A2 notice is against natural justice and in violation of the provision of sub section (2).

9. Sub section (2) of Section 247 reads:-

"(2)The Commissioner shall

> serve a copy of the provisional order made under sub section (1) on the owner of the building or well together with a notice requiring him to show cause within a reasonable time to be named in such notice why the order should not be confirmed."

Sub-section (2) mandates that Commissioner shall serve copy of the provisional order together with a notice requiring the owner to show cause within a reasonable time to be named in such notice, why the order should not be confirmed. Under sub-section (3), if the owner fails to show cause to the satisfaction of the Commissioner, Commissioner may confirm the Order with any modification he may think fit to make, and such order shall then be binding on the owner and on the failure of the owner to comply with the order, the Commissioner may himself cause the building or part thereof, to

be demolished and the expenses be recoverable from the owner. It is therefore clear that the notice contemplated under sub section (2) is to enable the owner of the building, against whom a provisional order was passed by the Commissioner under sub section (1), to show cause why the provisional order should not be confirmed. Sub-section (2) does not provide any specific time within which the cause is to be shown. It only provides "a reasonable time" is to be granted. The reasonable time so granted is to enable the owner, on receipt of the notice, to show cause why the order should not be confirmed. Once on receipt of the notice and the provisional order and within the time provided in the notice, the owner against whom the order was passed submitted an explanation showing the cause, it cannot be said that the notice is invalid for not granting sufficient reasonable time. As the reasonable time was intended to enable the owner to show cause, after he submitted the show cause, he is not entitled to contend that he did not get reasonable time as provided under sub section (2). The facts in

**Kuriakose case** are different. As per the notice served under sub section (2) of Section 247, the owner in that case was required to demolish the construction within 24 hours on receipt of the order with a direction to report compliance. In such circumstance, the said decision cannot be applied to the facts of the present case.

10. Moreover, section 364 enables the respondent to challenge a notice or order issued by the Commissioner under section 247. Sub section (1) of Section 364 provides that "an appeal shall lie to the council from- (a) any notice issued or other action taken or proposed to be taken by the Commissioner under section 247 also." Therefore under section 364(1)(a), respondent has a right of appeal against any notice issued like Ext.A2 or any other action taken or proposed to be taken by the Commissioner as in Ext.A1. Therefore the finding of learned Munsiff that respondent has an equal and efficacious remedy and therefore the suit is impliedly barred is perfectly correct. Unfortunately inspite of the specific finding on this aspect by the learned Munsiff, the first

appellate Court did not consider this point at all.Therefore the Second Appeal is allowed. The judgment of the first Appellate Court is set aside and that of the Munsiff is restored.

M.SASIDHARAN NAMBIAR
JUDGE

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M.SASIDHARAN NAMBIAR, J.

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S.A.NO.480 /1993

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JUDGMENT

27th MARCH,2007